

REMARKS

By way of this amendment claim 1 has been amended and claims 1 and 4-6 remain pending in the application. Support for the amendments to claim 1 is found in the specification at page 2, lines 10-21. As such, it is submitted that no new matter has been added by way of this amendment. Currently, claim 1 stands rejected under 35 U.S.C. §112, second paragraph, as failing to recite the structural cooperative relationship between components of the system (Paper No. 4, page 3, first paragraph). Claims 1, 4 and 6 also stand rejected under 35 U.S.C. §103(a) over Treyz (U.S. 6,678,215) in view of Schulz (U.S. 3,576,185) and further in view of information disclosed in the specification of the current application and official notice. Lastly, claim 5 stands rejected under 35 U.S.C. §103(a) over Treyz in view of Schulz and further in view of information disclosed in the specification of the current application and official notice and Adatia (U.S. 2003/0112262).

Remarks Directed to Rejection of Claim 1 under 35 U.S.C. §112, Second Paragraph

The basis of this rejection is that claim 1 has been deemed to omit the structural cooperative relationship between the components of the system, specifically the recitation as to the elements of the inventive system which generate the program and web link. In response to this rejection claim 1 has been amended to recite an access network with the relationship to other components believed necessary to overcome this rejection.

In light of the above amendments to claim 1, reconsideration and withdrawal of the rejection as to claim 1 and those claims that depend therefrom under 35 U.S.C. §112, second paragraph, is requested.

**Remarks Directed to Rejection of Claims 1, 4 and 6 over Treyz
in View of Schulz and Further in View of Information Disclosed in
the Specification of the Current Application and Official Notice**

Treyz is cited for teaching a network-based program to produce sounds for a user yet is deficient in lacking a teaching as to the inclusion of sleep-inducing sounds as media available to the user. (See Paper No. 4, page 3, last sentence). Schulz is cited to bolster the teaching of Treyz for teaching tones from 40 to 80 Hz. The specification admission that oscillatory sounds in the frequency range of 3 to 30 Hz and preferably between 5 and 15 Hz are well known to induce relaxation and somnolence (page 3, lines 8-10) is cited for the proposition that "it would have been obvious to alter the combination of Treyz and Schulz to produce the lower frequency tones in the range of 3-30 Hz with a goal of maximizing relaxation of the user." (Paper No. 4, sentence bridging pages 4-5). Treyz is further cited as disclosing a program linked to a website yet is deficient in that the reference lacks a web link to sleep-related research, sleep products or a sleep discussion chat room. To cure this deficiency, Official Notice is taken that web links on the Internet to such sleep-related material are well known.

Applicant submits that the prior lacks motivation to make the reference combination of the outstanding rejection. As the Examiner has correctly pointed out, Treyz is devoid of disclosure as to the inclusion of sleep inducing sounds as media available to a user. In exploring the best argument for Treyz being motivation for the inclusion of such sleep inducing sounds, discussion as to the teachings of this reference follow. Treyz has as its objective providing improved audio devices as well as places for receiving audio signals other than traditional radio broadcasts (column 8, lines 29-31). Applicant submits the only teaching of Treyz relevant to sleep is in fact a contrary teaching in that it is in regard to an alarm clock set to provide the

desired wake-up time (column 2, line 61). Treyz further teaches that a variety of audio content can be played "upon wake-up in an alarm clock" (column 5, lines 66-67). As such, it is submitted that Treyz teaches the use of an audio device to terminate a sleep session and not to induce such a session. Applicant submits that the arguments provided in the outstanding Office Action (Paper No. 4, page 2) as to other audio devices and referencing column 8, lines 35-40 is likewise submitted to not provide any motivation for inclusion of sleep inducing media. As these other audio devices are contemplated as alternative ways of handling audio signals other than traditional radio broadcasts, Applicant submits that no additional motivation as to providing a user with sleep inducing sounds is found in the reference text of column 8, lines 35-40. As a result, Applicant again reiterates that the only motivation in Treyz for the provision of sleep inducing sound is in fact the contrary embodiment of a clock radio where media content provided is intended to awake a user and not induce sleep. As such, the only motivation found in Treyz relative to sleep inducing media content is submitted to teach away from the presently claimed invention.

Likewise, Schultz is explicit in that the sleep inducing signal is between 40 and 80 Hz and includes a pure sinusoidal signal that is modulated (column 1, line 73 – column 2, line 4; claim 1). Owing to the criticality recited within Schultz as to both the frequency and the modulation of the carrier signal, Applicant submits that one of skill in the art would find no motivation to modify Schultz so as to provide a sound having a frequency of between 3 and 30 Hz. This is especially true in light of the fact that Schultz teaches that the 40 to 80 Hz carrier signal is critical to the mode of action, namely inducing synchronization of breathing rhythm (column 1, lines 49-51).

Likewise, the information disclosed in the instant specification at page 3, lines 8-10 acknowledging that 5 to 15 Hz frequencies are known to induce relaxation and sleep likewise lacks a motivation for combination with the other references that make up the current rejection.

The Official Notice of Internet sites related to sleep research, sleep products or sleep discussion chat rooms represents freestanding information that provides no motivation for provision of an Internet based program for generating repetitive sleep inducing sound having a frequency of between 3 and 30 Hz at a user location. As a result, this component of the prior art reference combination also is devoid of the motivation necessary to support a proper rejection under 35 U.S.C. §103(a).

Applicant submits that the only motivation for the prior art reference combination of the outstanding rejection is found within the teachings of the pending application. It is well-established law that such reliance on the pending application is improper as hindsight reconstruction.

The Examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. See *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 177 (CCPA 1967), *cert. denied*, 389 U.S. 1057 (1968). Our reviewing court has repeatedly cautioned against employing hindsight by using the appellant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. See, e.g., *Grain Processing Corp. v. American Maize-Prods. Co.*, 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988).

When determining obviousness, "the [E]xaminer can satisfy the burden of showing obviousness of the combination 'only by showing some objective teaching in the prior art or that

knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.” *In re Lee*, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002), citing *In re Fritch*, 972 F.2d 1260, 1265, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). “Broad conclusory statements regarding the teaching of multiple references, standing alone, are not ‘evidence.’” *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). “Mere denials and conclusory statements, however, are not sufficient to establish a genuine issue of material fact.” *Dembiczak*, 175 F.3d at 999-1000, 50 USPQ2d at 1617, citing *McElmurry v. Arkansas Power & Light Co.*, 995 F.2d 1576, 1578, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993).

As such, Applicant submits that the subject matter of claim 1 is nonobvious over the outstanding prior art reference combination.

Pending dependent claims 4 and 6 are submitted to be patentable on the basis of dependency from claim 1, now believed to be in allowable form.

In light of the above remarks, reconsideration and withdrawal of the rejection as to claims 1, 4 and 6 under 35 U.S.C. §103(a) over Treyz in view of Schultz and further in view of the disclosure within the instant specification and official notice is requested.

**Remarks Directed to Rejection of Claim 5 over Treyz in
View of Schulz and Further in View of Information
Disclosed in the Specification of the Current Application and Adata**

Claim 5 is submitted to be in allowable form as a result of dependency from base claim 1, now believed to be in allowable form. Applicant hereby incorporates by reference the above remarks made with respect to Treyz and Schulz in regard to the rejection of claim 5. Adata does not provide a motivation that would bolster the above recited rejection deficiencies.

Additionally, Schulz also contemplates the use of acoustical and optical means combined to induce sleep with the optical and acoustic output being modulated in concert (column 1, lines 35-47). As such, Schulz teaches that a visual signal must necessarily also be within a frequency range of 40 and 80 Hz and modulated. The pending application teaching of 5 to 15 Hz also lacks a motivation for the inclusion of synchronized light effects.

Claim 5 recites the limitation of a “visual stream changing in concert with said sound [having a frequency between 3 and 30 Hz].” As the prior art reference combination fails to teach a visual effect modulated in the 3 and 30 Hz frequency range in concert with the repetitive sleep-inducing sounds as iterated above with respect to claim 1 and Adatia does not cure this deficiency, it is respectfully submitted that a *prima facie* case of obviousness has not been established with regard to claim 5.

In light of the above remarks, reconsideration and withdrawal of the rejection as to claim 5 under 35 U.S.C. §103(a) over Treyz in view of Schulz and further in view of information provided in the current specification and Adatia is requested.

Summary

Claims 1 and 4-6 remain pending in the application. Reconsideration and allowance of the claims is also solicited. Should the Examiner have any suggestions as to how to improve the form of the pending claims, it is respectfully requested that the undersigned attorney in charge of

this application be contacted at the telephone number given below to resolve any remaining issues.

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Respectfully submitted,

By /AAG/

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